United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7531 ORIGINAL

To be Argued by
George H. Rosen, Esq.

2-24

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- X

VINCENT J. BELLOWS,

Plaintiff-Appellee,

-against-

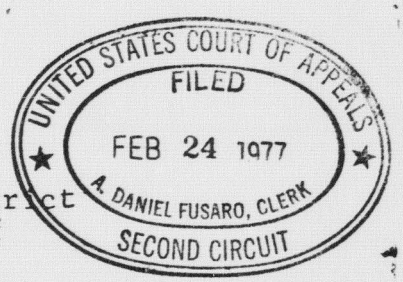
DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants-Appellants.

- X

CASE NUMBER
76-7531

District Court
File Number
73 Civ. 1189



Appeal from the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLEE

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MISCELLANEOUS

UNITED STATES COURT OF APPEALS
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BRIEF OF PLAINTIFF-APPELLEE

FACTS

Plaintiff-appellee testified that on July 16, 1972 defendants-appellants who were State Police Troopers in uniform seized Bellows although no crime had been committed in their presence, twisted his arm and shoved him into a State Police car at or after 11:00 P.M. (Tr. 16). Bellows' witness Miller testified to the same effect (Tr. 63).

Bellows shouted to his friend Miller to call Mr. Rosen, who was and is attorney for Bellows (Tr. 16). Miller

testified that he heard Bellows call him to get Mr. Rosen (Tr. 64). Defendant Dainack testified he heard Bellows call to his friends to call his (Bellows') attorney (Tr. 155). Defendant Van Houten testified that he heard Bellows "yell over to his friends, 'Tell my wife to call my attorney'" (Tr. 169).

The defendants drove Bellows around in the dark about 2 1/2 miles (Tr. 18). Defendant Dainack testified he drove Bellows 1/2 mile - 3/4 of a mile altogether and it took 5 to 10 minutes (Tr. 127 line 20, Tr. 128 line 24).

The defendant Dainack while in the State Police car pulled Bellows forward by grabbing hold of the collar of Bellows' shirt and pulling him forward, and struck Bellows in the ribs (Tr. 19). The witness Miller testified that when Bellows was released he said he saw Bellows walking up the street "holding his side" (Tr. 88).

Miller heard appellee Bellows ask the defendants if he, Bellows, was under arrest and they said he was not under arrest (Tr. 85). Bellows said he was not going to get into the police car and "they put him in" (Tr. 83).

The defendants claimed that they arrested Bellows for public intoxication (Tr. 116) and then released him after he had been in their custody for not more than 10 minutes. Defendants did not take him to the State Police Barracks or arraign Bellows before any judge or court or make any report of the purported arrest (Tr. 115,118). The Regulations of the State Police require that a report of an arrest be made (Tr. 134-135). Defendants failed to make any report as required which showed that the claim of defendants that an arrest had occurred was false and fabricated for the trial.

Defendants testified that Bellows was so intoxicated that defendants had to arrest him which required that they take him to the State Barracks or to a judge or court. The claim of the defendants that they gently helped Bellows into the police car when he refused to get into the police car voluntarily resulted in defendants-appellants using force to shove him into the police car and to twist Bellows' arm to subdue him.

Bellows was alone in the police car with the defendants Dainack and Van Houten (Tr. 133, line 21).

There were no witnesses to what defendants did to Bellows while they held him in the police car in a dark rural section of Livingston Manor.

The issues of fact were presented and the jury had the opportunity to determine the credibility of the witnesses. Other aspects of the false defense offered by defendants-appellants will be discussed post but the facts as set forth in defendants-appellants' brief at Pages 3-5 with respect to their actions against Bellows are not in accordance with the evidence.

Defendants-appellants claimed that they released Bellows because he cried (Tr. 105). The State Police located at the Ferndale State Police Barracks had arrested Bellows on many occasions on various false charges harassing Bellows without justification. Bellows was fully instructed by his counsel, the undersigned, of his rights and how to deal with any harassment by the State Police. Bellows' counsel was available at all hours of the day or night if Mr. Bellows called for help. That night when this occurred was no exception (Tr. 124). Bellows only gave his name and refused to answer any

questions (Tr. 142). The defendants then used forceful action. Bellows yelled to his friends on the stoop to call his lawyer. Within 1/2 hour after he was released Bellows was at the Ferndale State Police Barracks and filed a complaint against defendants (Tr. 145).

Every act of the defendants-appellants showed a wanton arrogant exercise of power without regard for the rights of Bellows to sit on the stoop of his home free from police molestation. Such a right is the heart of civil rights.

Title 42 U.S.C.A. §1983 specifically covers defendants-appellants' actions herein. Counsel for Bellows read the section to the jury in his summation (Tr. 279-280). The charge of the Court restated the law (Tr. 306 line 24, Tr. 307 line 1-6).

ISSUES IN THIS CASE

1. Were the acts of defendants-appellants who were State Police Troopers, in seizing plaintiff late at night from the stoop of his residence; twisting his arm behind his back; shoving him into a State Police car; punching him in the chest while in the State Police car; driving

plaintiff around for 5 or 10 minutes over dark roads; releasing him without taking him to the State Police Barracks, and without presenting any charge against plaintiff before any Court or judge violations of plaintiff's civil rights?

2. Did defendants-appellants waive any question about the summation of plaintiff's counsel when counsel for defendants-appellants failed to object to same on the trial?

3. Can the charge of the Court to the jury be reviewed herein where defendants-appellants' counsel did not except to the charge?

4. Was the determination of the jury fixing the compensatory damages and punitive damages correct as amended by the Trial Court under the facts of this case?

IN REPLY TO POINT I OF APPELLANTS' BRIEF THAT THIS IS A SIMPLE TORT ACTION AND NOT A CIVIL RIGHTS CASE

The appellants' brief endeavors to avoid the issue in this case and to claim that defendants did not use excessive force. They further claim that the action was a simple tort case which should have been instituted in the State Courts.

The contention is erroneous because this is a case involving the violation of plaintiff-appellee's civil rights.

The two defendants were in State Police uniforms and seized and forced plaintiff in the State Police car. He was forced and shoved into the police car by defendants (Tr. 16). The car was a State Police car (Tr. 96).

Plaintiff was seized from the stoop of his home in Livingston Manor (Tr. 15) and he was held by defendants without taking him to the Police Barracks or before a judge (Tr. 15).

The defendants tried to cover up their illegal acts by claiming that they arrested plaintiff for public intoxication (Tr. 105). Defendant Dainack told Bellows he was under arrest and was going to the station house for "fingerprints" and "identification" (Tr. 105; 116).

David Miller was called as a witness by Bellows and stated that when defendants came up he heard the following (Tr. 85):

> "The Court: What did you hear?
>
> "The Witness: He asked them if he was under arrest and they said 'No'. He said, 'Well I'm not going to get in the car.' And they said, 'Oh, yes you are' and they put him in."

Miller was only 10 or 12 feet from the troopers' car (Tr. 85-86). The defendants grabbed hold of plaintiff (Tr. 86).

The Court asked Miller if Bellows, the plaintiff, looked different after he was released by defendants and Miller testified (Tr. 88):

> "The Witness: He was walking up the street, he was holding his side."

Defendants denied that the plaintiff was struck while in the police car but the testimony was incredible and the jury didn't believe defendants' testimony.

Defendants failed to report the alleged arrest to the State Police Barracks (Tr. 115-116) or to any court or judge (Tr. 118). State Police regulations require that an arrest must be followed through by a charge against the person arrested (Tr. 134-5).

The claim that plaintiff was intoxicated was false and untrue because at the moment when defendants shoved plaintiff into the State Police car he called to his friend Mr. Miller to call his lawyer (Tr. 16). One-half hour after he was released by defendants, plaintiff made a complaint against the defendants at the State Police Barracks (Tr. 20). Such actions by plaintiff contradict the claim that he was intoxicated.

David Miller was present and saw defendants seize plaintiff-appellee and one of them twisted plaintiff's arm up behind his back and "threw him in the back seat" (Tr. 63).

Plaintiff shouted to Miller to call Mr. Rosen, his lawyer (Tr. 64). Defendant Van Houten testified that he thought "it seemed strange" that Bellows called for his lawyer at the time (Tr. 185 line 18-23).

Further the defendants claimed that they held plaintiff 3 or 4 minutes and decided he was not intoxicated (Tr. 130 line 20).

The decision to release plaintiff after he was purportedly arrested for public intoxication was incredible. A person cannot be intoxicated and within 3 or 4 minutes be sober.

The jury decided the issues against the defendants. An appeal is not the vehicle for arguing the facts found by a jury.

Plaintiff did not sue for the assault upon him. Plaintiff did not claim any permanent personal injuries.

The basis for this action was the unlawful seizure of plaintiff and holding him in custody. The defendants acted as police officers and asserted their authority.

There was no justification for their actions and the plaintiff was entitled to be free from such arbitrary police actions.

Title 42 U.S.C.A., §1983 reads as follows:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (underlining ours).

That is precisely what the defendants did to plaintiff.

§1985 Title 42 bars conspiracies which deprive a person of his civil rights.

§1986 Title 42 requires a person to prevent violations of the civil rights of another if he can do so. The defendants were police officers and each is liable for failure to prevent the other from violating plaintiff's civil rights.

Plaintiff also sued under the 5th Amendment of the Constitution (Appendix P. 2a). Acts which deprive a person of liberty, without due process of law are barred. In the case at bar defendants purportedly "arrested" plaintiff-appellee and held him in their custody. Defendants unilaterally decided to release plaintiff. They failed to arraign plaintiff in any court or before any judge.

The defendants were usurping the courts and plaintiff's civil rights because they decided what to do by arresting plaintiff, held him at their whim and then decided to release him. The brief duration of the plaintiff's detention is not the issue. The issue is the wanton arrest, seizure and punching plaintiff around while in the State Police car.

Under the 14th Amendment plaintiff, a citizen, is entitled to the right to sit on the stoop of his own home and be free from arbitrary arrest, seizure and being punched and abused by State Police officers.

Such a situation is a violation of civil rights and cognizable under §1983 by action in the Federal Courts.

IN REPLY TO POINT II OF DEFENDANTS-APPELLANTS' BRIEF THAT THE TRIAL COURT ERRED IN RULINGS AND APPELLANTS WERE DEPRIVED OF A FAIR TRIAL

Under this Point II appellants charge the Trial Court with errors relating to evidence to overcome the allegations of defendants-appellants on the trial that the appellee cried in the State Police car and the defendants then let him go.

The incident occurred on July 16, 1972 and defendants gave statements to their superiors in connection with the complaint made by Bellows within 1/2 hour after he was released.

At no time did defendants or either of them report that they released plaintiff because he cried. This claim was presented for the first time at the trial herein. D'Onack so testified at Tr. 195 line 25-Tr. 196, line 4-16. Van Houten so testified at Tr. 190, line 7-15.

That was a peculiar reason for any policeman or state trooper to release a person charged with a crime or violation. If a person committed a robbery or burglary or some other violation, he could get a release if he cried hard enough.

On cross-examination the following testimony was given: Tr. 120:

"Q. While you (Dainack) were in the car, and in answer to the court's own question, you said Mr. Bellows cried, right?

A. Yes.

Q. Tears were down on his face?

A. Yes.

At Tr. 195-6:

Q. Trooper Dainack * * * in this examination in connection with the investigation on Vincent Bellows before the State Police Department, you gave certain testimony. Is it not a fact that you never mentioned in that testimony that Mr. Bellows was crying, never mentioned he said "you fellows never give anybody a break".

A. Yes sir.

Q. When was the first time you mentioned that fact?

A. Here in Court.

Q. That was yesterday.

A. Yes sir."

The defendant-appellant Trooper Van Houten testified at Tr. 190:

> "Q. In the investigation* that was made, and in which you were called to testify before the investigating officer, you made a statement and subsequently verified it on July 20, 1972. Did you at any time in that statement tell the investigating officer what you said here today** that Vincent Bellows was crying and said you did not give anybody or never give anybody a break?
>
> A. I don't believe I did, no."

At Tr. 191:

> "Q. When for the first time did you make that statement about crying?
>
> A. On the record?
>
> THE COURT: Yes.
>
> A. Right there today."

Both defendants testified at the trial on March 22, 1976 as to the event which occurred on July 16, 1972, that plaintiff cried and for that reason let him go. Defendants failed to give such fact in their statements of July 20, 1972 in the investigation of the Bellows complaint. *

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* The investigation was made by the N.Y. State Police of the complaint by the plaintiff Vincent J. Bellows that the defendants had assaulted him and held him in custody without justification.

** Tr. 170.

The Trial Court then in its discretion allowed Bellows to show his background experience with the State Police for the sole purpose of contradicting the false testimony of defendants that he cried (Tr. 222, line 25; Tr. 223-232).

The Court stated at Tr. 226, line 12; Tr. 229, line 14; Tr. 232, line 11 that the testimony was permitted and limited to the sole issue of whether appellee cried as the defendants testified.

The defense made by defendants that they released Bellows because he cried was patently false. They did not report the arrest; they did not mention the alleged crying in the statements that they gave in proceedings on the complaint of Bellows against them; they injected it into this case to show that they were "gentle" considerate officers.

But the climax of it all came when counsel for defendants-appellants said at Tr. 224, line 20:

> "Mr. Greenwald: I also state I do not see what great relevance whether he cried or didn't cry, is to this case.
>
> The Court: Mr. Greenwald, that is for the jury to decide, not for you".

Defendants-appellants injected the issue of crying and when Bellows answered the issue then suddenly the testimony given by the defendants with respect to the reason why they released Bellows because he cried became irrelevant. If such issue became irrelevant then there was no credible basis for defendants' claim that they released Bellows because he cried. The purported arrest for public intoxication likewise fell because every act of Bellows from his refusal to give more than his name, his resistance to getting into the police car, his calling for his lawyer and his prompt complaint to the State Police Barracks were the acts of a reasonable and knowledgeable person.

Now under Point II of appellants' brief they claim the Trial Court erred in its rulings. The initial error was the injection of the issue of crying by the defendants-appellants. They cannot now claim error occurred because the Trial Court gave limited permission to introduce testimony from which the jury could find that Bellows would not cry. Such limitation favored defendants-appellants.

IN REPLY TO POINT III OF APPELLANTS' BRIEF

THE SUMMATION OF APPELLEE'S COUNSEL WAS PROPERLY MADE UPON THE EVIDENCE AND IN REPLY TO THE SUMMATION OF APPELLANTS' COUNSEL

The appellants devote a portion of their brief to the contention that appellee's counsel made statements appealing to sympathy or prejudice or were outside the scope of the evidence.

The said contentions of the appellants are without justification and in particular the testimony of the defendants-appellants warranted the harshest criticism because of the falsity thereof.

Nowhere in the brief of the appellants do they refer to the testimony of the events of the night when defendants seized plaintiff-appellee, drove him to a dark and isolated area, and then drove him back to Livingston Manor but not to his home. The plaintiff testified to his being physically forced into the defendants' police car and while in the car as it was being driven, that defendant Trooper Dainack grabbed him and pulled him forward and punched plaintiff.

Immediately on the return of the plaintiff, and within 1/2 hour after his return, he went to the Ferndale Station of the New York State Police, to which defendants were assigned, and filed a complaint against them.

This is how the attorney for the defendants-appellants referred to this testimony in his summation for appellants: (Tr. 274, line 20):

> "I further point out as to Mr. Bellows' attitude, you have heard -- and I think it was right on -- right in Mr. Bellows' testimony -- that he has been trained, apparently trained, to be uncooperative with the New York State Police. Now, consider for yourself, I think if while everyone has rights and there is nothing wrong with asserting your right. I think that it is something when you consider Mr. Bellows credibility, this training, and of course this training was given to you solely for the purpose of saying he would not cry in the car. Apparently it seems to be a big insult that he would have cried in the state policeman's car, I do not see what it has to do that much with anything. Crying is a human emotion. I do not think it lowers a person in anybody's esteem. (emphasis supplied).

The foregoing illustrates the contradictory position of appellants' counsel. He told the jury his opinion; the

very thing he objects to in Bellows' counsel's summation. See COMPAGNIE NATIONAL AIR FRANCE v. NEW YORK PORT AUTHORITY, 427 F. 2d 951 (2nd Cir. 1970) at Page 956.

In a footnote at Page 6 of appellants' brief, the situation is distorted by the statement that "plaintiff had become hardened as to being arrested". This event was not the innocent act of two diligent police officers but was the malicious and vindictive act to harm plaintiff-appellee.

The foregoing shows the foundation of the defense. There is no basis for the contention that Bellows' counsel referred to matters to create sympathy or cause undue passion. The defense of the defendants-appellants by itself was sufficient to support the action of the jury.

At Page 15 of appellants' brief reference is made to COMPAGNIE NATIONAL AIR FRANCE v. NEW YORK PORT AUTHORITY, supra, the Court held that the statements by counsel that a witness was a liar, a cheat and a perjuror were not sufficient to warrant reversal. In the case at bar no such situation existed.

At Tr. 274, line 16-19, counsel for appellants specifically gave his opinion that he thinks "Mr. Rosen seems concerned that he never got the opportunity to go down to the station house or the J.P., and turn Vincent Bellows loose again. He seems to take pride in that."

That statement was improper and places the contentions of appellants and their counsel in a very poor light.

At Page 19 of appellants' brief they state that a denial of their self serving statements cannot be made. The appellants' counsel tried to belittle the arrest, the force used by defendants against Bellows to get him into the police car, the punch in the chest, the pulling of plaintiff forward in the police car, the failure to arraign plaintiff in Court, and the presentation of a false reason for letting plaintiff go. To meet such contentions plaintiff's counsel had the right to describe the situation. Now defendants-appellants claim Mr. Bellows appealed to sympathy. This case did not turn on sympathy but on the vicious acts of the defendants.

Sympathy as a basis for a verdict must exclude all other reasonable grounds. In this case the record shows that sympathy played no part in the verdict.

We call the Court's attention to Tr. 269, line 4, 14, 15-21; 270, line 8, 14; 271, line 13; 272, line 22; 273 line 17; 274, line 10, 13-25; 275 line 1-9; 276; and 279 setting forth numerous instances where defendants-appellants' counsel in his summation injected his opinions and statements, and divers references to an alleged lack of evidence to support the summation by Bellows' counsel despite the existence of evidence which warranted the summation.

One illustration of the situation appears at Tr. 270, line 24, in appellants' counsel's summation, to wit:

> "But as I have emphasized, there was no action in the car* other than being driven. There is no claim by Mr. Bellows that anything else happened."

That statement is very erroneous. At Tr. 16, line 6 Mr. Bellows testified as follows:

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* the police car.

Q Tell the court and jury in your words exactly what happened?

A A state police car pulled up in front of my house, and I noticed there were two officers in the car. And they yelled at me to come to the car, which I did.

And they asked me for identification, and I told them my name. And at that time they told me to get in the car.

And I said -- I asked them if I was under arrest, and they said no, but "get in the car."

And I told them that I didn't have to get in the car if I wasn't placed under arrest.

Q What did they do?

A They got out and forced me into the car.

Q Describe how they forced you in.

A One of them opened the door and the other one took me in the arm, twisted my arm up behind my back and shoved me into the back of the police car.

Q Did you say or shout anything at that time?

A I shouted to Mr. Miller to call Mr. Rosen.

At Tr. 18, line 1-25, Tr. 19, line 1-10:

Q Will you be good enough sir, to answer my question? What did they do with you after they slammed the door on you and put you in the back of the car?

A They drove off going east, in an easterly direction that would be on Pearl Street in Livingston Manor, which leads out to like Route 17 expressway.

Q How far did they drive you?

A About two and a half miles.

Q During the course of that drive, did they do anything to you?

A Yes.

Q Tell us exactly what they did?

A The officer that was riding as a passenger in the front seat knealt in the front seat and facing me.

THE COURT: Do you know which one he was?

THE WITNESS: Officer Dainack.

THE COURT: Give us names from now on.

Q Use names, if you do not mind. What did they do?

A He hit me in the ribs.

Q Did he grab you in any way?

A Well, he pulled me with my shirt towards him so he could reach me.

THE COURT: Can you demonstrate for us?

THE WITNESS: Yes, he grabbed me by the shirt and pulled me up to the --

THE COURT: Indicating the grabbing hold of the collar of the shirt and pulling forward.

Q How many hands did he use to pull you with?

A One.

Q What did he do with the other hand?

A Struck me.

Q Where did he strike you?

A In the ribs.

The brief of appellants makes frequent references to ethical conduct and to the Canons of Ethics. The code of Professional Responsibility contains the following rule DR 7-106C(3):

> "In appearing in his professional capacity before a tribunal, a lawyer shall not: * * * (3) Assert his personal knowledge of the facts in issue except when testifying as a witness".

Appellants' counsel not only expressed his opinion on the facts but erroneously and knowingly misstated the facts about what occurred in the state police car.

At Tr. 271, line 13, appellants' counsel again gave his opinion as to the testimony of David Miller.

At Tr. 272, line 22, appellants' counsel told his opinion that the jury should not give much credence to Mr. Bellows' testimony.

At Tr. 273, line 17, appellants' counsel referred to police procedures normally performed although there was no evidence to justify that.

At Tr. 274, line 16, appellants' counsel characterized the counsel for Mr. Bellows as being desirous of going to the station house "to turn Vincent Bellows loose again. He seems to take pride in that". That remark was scandalous. Mr. Bellows had been subjected to harassment by the State Police and been arrested on fictitious and groundless charges resulting in uniform dismissals or acquittals. Because of that background Mr. Bellows had been instructed how to handle himself when the police repeated their attacks upon him. This was fully set forth in the record and was the principal reason why Mr. Bellows would not cry when in police custody.

In like manner various other references to the summation are without foundation and would necessitate extending this brief inordinately. The summation was well within the bounds of propriety and brings to mind the oft repeated statement that if the facts and the law are against you attack counsel.

The defendants tried to justify their illegal actions by claiming that plaintiff was intoxicated but they released him within 5 or 10 minutes after seizing him.

Both defendants corroborated Bellows' testimony that he shouted to have someone call Mr. Rosen. Dainack admitted it at Tr. 154, line 5-25; Tr. 155, line 1-25; Tr. 156, line 1-6. Van Houten admitted it also at Tr. 185, line 19-23.

Counsel for appellants told the jury that he, counsel, thought that the jury should not put much credence in Mr. Bellows' contention that he was not drunk.

Counsel for appellants made statements which induced replies and now complains.

Point III of appellants' brief is without substance or merit.

IN REPLY TO POINT IV

THE COURT GAVE A FAIR CHARGE WITH GREATER WEIGHT TO THE DEFENDANTS-APPELLANTS' POSITION

The Trial Court gave a fair and correct charge (Tr. 304-325).

No exceptions were taken to the charge (Tr. 325).

Counsel were asked by the Court if there were any objections or further requests (Tr. 325, line 14).

Mr. Greenwald counsel for defendants-appellants said (Tr. 325, line 19):

> "Mr. Greenwald I think I expressed some objection to the form of this special verdict and that is it."

On this record defendants-appellants waived their present contentions in Point IV of their brief that the charge was "misleading, inadequate and erroneous and deprived the appellants of a fair trial".

The Trial Judge was most considerate in the handling of the trial and accorded defendants-appellants and their counsel every possible consideration.

The phrasing of the Point IV at Page 26 of appellants' brief follows the line that an adverse verdict is attributable to unfairness regardless of the evidence and weight of the evidence which support the verdict. The Court specifically charged the jury that it was to decide (Tr. 307, line 12):

> "The question you have to decide is whether they deprived Mr. Bellows of his liberty without due process of law * * *".

Again the Court charged that Mr. Bellows had to establish by a preponderance of the evidence that defendants deprived him of his constitutional rights (Tr. 308, line 13). This charge was favorable to the defendants.

The jury found by its verdict that the defendants had no reasonable cause to seize Bellows. The release of Bellows within 5 or 10 minutes after defendants seized him without reporting the arrest or arraignment of Bellows in a court of law branded the claim of arrest as false or incredible. That is no basis for claiming an erroneous charge or an unfair trial.

The position of appellants at Page 28 of their brief is incomprehensible. If it has any meaning at all, the charge favored defendants. No police officer has the right to seize a citizen from his residence, force him into a police car, drive him about for any length of time, grasp his collar and force him into a position where the officer can punch the citizen in the chest or ribs and then release the citizen. If this is possible then any police officer can hold any person in custody at a place chosen by the police officer at his whim, and to detain such citizen for as long as the police officer unilaterally decides. The duration is not the test. The test was the exercise of force to deprive Bellows of his freedom, his right to sit on his stoop unmolested by defendants-appellants. The defendants-appellants did not pick Mr. Bellows off the street. They took him from his home. That action was per se unconstitutional and an act of oppression. The jury so found. The jury could not find otherwise.

Likewise appellants at Page 29 of their brief claim that the charge was erroneous but their statements are

inexplicable. There was no exception taken by defendants-appellants and the point they now make is not reviewable. Even if it were reviewable it was not erroneous in any way. A far more serious error occurs in the appellants' brief for which there is no excuse. The appellants' brief at Page 26 erroneously quotes from the charge of the Court as follows:

> "1. As to Bellows' claim that improperly taken into custody, do you find, from a preponderance of the credible evidence -- and I should have used the word 'incredible' throughout my charge -- 'that the defendants had reasonable cause to believe that Vincent Bellows was publicly intoxicated in their presence on the evening of July 16, 1972, and that they acted in good faith in taking him into custody?'
>
> "That question is to be answered yes or no" (Tr. 319).

The actual wording in the transcript Tr. 319, line 17 reads as follows and the words omitted or misstated are underlined for easy observation:

> "1. As to Bellows' claim that <u>he was</u> improperly taken into custody, do you find from a preponderance of the credible evidence" -- and I should have used the word "<u>credible</u>" throughout my charge -- "that the defendants had reasonable cause to believe that Vincent Bellows was publicly intoxicated in their presence on the evening of July 16, 1972 and that they acted in good faith in taking him into custody?
>
> "That question is to be answered yes or no?"

The words underlined give the charge meaning whereas the citation in appellants' brief presents the charge as so much gibberish.

There was nothing erroneous or unfair about this item and in fact was most favorable to defendants-appellants.

The citation of BIVENS v. SIX UNKNOWN AGENTS OF THE FEDERAL BUREAU OF NARCOTICS 456 F. 2d 1339, 1348 (2nd Cir. 1972) at Page 30 of appellants' brief is not in point because defendants-appellants were given the utmost latitude to prove their defenses but their evidence of good faith was insufficient, and proved their violation of the plaintiff's civil rights.

The Court's charge at Tr. 319, line 12 presented the issue of good faith of defendants-appellants.

The defendants-appellants engage in a semantic discussion of public intoxication. On the one hand they claim that they arrested Bellows for public intoxication and now claim that he was not drunk. Bellows was sitting with his friends on the stoop of his residence and was not

annoying anybody. He was not even on the sidewalk but was within the exterior portion of the building where he lived. The moment the police seized him, twisted his arm behind his back and shoved him into the police car, Bellows shouted to his friend Miller to call Mr. Rosen, his lawyer.

That act of Bellows calling to Miller to call Bellows' lawyer was not the act of a person who might "endanger himself or other persons" under §240.40 N.Y. Penal Law,(see Page 31 of appellants' brief). No man or person could have acted more protectively of his rights than Bellows. He didn't mince words. He didn't slobber about what he needed and wanted. He instantly and loudly told his friend to call his lawyer.

Is that the act of an intoxicated person who might endanger himself or others? Plaintiff-appellee was in full possession of his faculties and acutely aware of the fact that defendants-appellants, State Police officers were going to harm him because when they asked him for his name he said my name is Vincent J. Bellows and that "I'm not

going to tell you anything else. I don't have to. And I'm walking away" (Tr. 101, line 13).

Then the defendants-appellants grabbed Bellows, twisted his arm behind him and shoved him into the police car. Defendants-appellants tried to fool the Court and jury by testifying that plaintiff-appellee voluntarily got into the police car and that defendants-appellants gently assisted him.

The mere recital of the facts, even as given by defendants-appellants shows the falsity of their testimony. The jury was not fooled.

Bellows was released by defendants-appellants and within 1/2 hour was at the Ferndale State Police Barracks to file a complaint against the defendants (Tr. 20, 58-59). The State Police Barracks are about 15 miles from Livingston Manor. The point to be noted is the speed with which Bellows acted.

A person who is intoxicated does not act as a prudent person might act. Mr. Bellows' actions were absolutely clear and cogent.

At Page 32 of appellants' brief, the charge is again criticized because the Court said that Mr. Bellows denied that he was drunk. Appellants' counsel did not except to the charge.

The quotation of the charge at Page 32 of appellants' brief omitted a part of the Court's charge, to wit:

> "Mr. Bellows denies that he was drunk, states that because he was sitting on the porch of his residence his behavior was not public; * * *." (Tr. 310, line 22)

The words underlined were omitted from the appellants' quotation at Page 32.

BLACK'S LAW DICTIONARY, 4th Ed., Page 957 defines Intoxication as follows:

> "But in its popular use this term is restricted to alcoholic intoxication, that is, drunkenness * * *."

The Court in its charge merely stated that Mr. Bellows denied that he was drunk. The Court could have gone further because public intoxication requires the party to be drunk. But we were not trying any charge of public intoxication

herein. The fictitious claim that defendants-appellants advance for seizing and holding Bellows was the issue and the jury found for Bellows which was a rejection of defendant-appellants' attempt to justify their claim of arrest.

The defendants-appellants have raised another contention that the case was s simple assault case and not a civil rights case, Page 33 of appellants' brief.

The summation of Bellows' counsel at Tr. 279 specifically stated that this is "not an assault case".

Appellants argue that only when excessive force is used can a suit be brought under §1983 (Pages 34-35 appellants' brief).

A civil rights case does not necessarily require excessive force. Even the term excessive force is a question of fact. The seizure of Bellows, twisting his arm behind his back, shoving him into the police car, driving Bellows around in the dark, pulling him by his shirt, punching him in the chest and holding him incommunicado does not create a basis to argue that excessive force was not used. The defendants are liable even if they did not break Bellows' bones or cause permanent injury.

The Statute §1983 was read to the jury and nowhere in the statute is excessive force the basis for suit (Tr. 280). The issue is deprivation of rights, privileges or immunities. No police officer has the right to seize a man from his home without a warrant and abuse him the way defendants abused Bellows.

At Page 37 the last three lines and the top of Page 38 of appellants' brief is the peculiar contention as follows:

> "Upon deliberation the jury was free to decide that the appellants had not proved their version of the story by a fair preponderance of the credible evidence and find in the appellee's favor. And there is no guarantee that they did not shift the burden of proof to the appellants."

The charge of the Court at Tr. 308 placed the burden of proof on plaintiff-appellee. Under the BIVENS case supra cited by defendants-appellants at Page 30 of their brief, the burden of proof is on the police officer who:

> " * * * must allege and prove not only that he believed in good faith, that his conduct was lawful, but also that his belief was reasonable."

That is appellants' citation and like so many things in this case, it supports Bellows' position.

See also MANFREDONIA v. BARRY, 401 F. Supp. 762 at Page 768 (E.D.N.Y. 1975).

The Court properly charged the jury as to defendants-appellants' contentions Tr. 313-317. The appellants' brief excerpts various sentences or parts of sentences which do not fairly portray the contents of the charge. Every contention of defendants was charged.

There was no exception to the charge so that there is no basis for appellate review. We have set forth our opposition to the contentions of the defendants-appellants because the assertion of divers contentions for which there is no legal or factual justification might lead the Court to the conclusion that the Court below acted unfairly or contrary to the law. The format of appellants' brief forces a reply even though there is no substance to the appellants' points.

IN REPLY TO POINT V

THE AWARD OF DAMAGES WAS JUSTIFIED UNDER THE FACTS OF THIS CASE

Defendants-appellants contend that the award of compensatory and punitive damages were either not allowable or were excessive.

There are many cases based on their own facts which resulted in more or less damages than the amount awarded to plaintiff-appellee for compensatory and punitive damages.

The jury awarded $12,000.00 for compensatory damages and $5,000.00 for punitive damages. The jury even distinguished between the 2 defendants. $3,000.00 was awarded for punitive damages against defendant Dainack because he was the one who struck Bellows in the police car. $2,000.00 was awarded against defendant Van Houten. Defendants acted together in seizing Bellows and depriving him of his liberty.

On defendants' motion the Trial Court reduced the award of compensatory damages from $12,000.00 to $4,000.00.

The damages awarded herein are based on the facts and the false defenses presented by the defendants-appellants. They claimed they released Bellows because he "cried" with tears from Bellows' eyes (Tr. 105).

No police arrest can be justified if they release the person arrested because he cried. In this case plaintiff did not cry. But the reason for releasing Bellows was unworthy of belief.

Although defendants introduced the evidence of alleged crying as the reason for releasing Mr. Bellows and when such testimony was shown to be obviously untruthful, counsel for the defendants said the following (Tr. 224, line 20):

> "Mr. Greenwald: I also stated I do not see what the great relevance whether he cried or didn't cry is to this case."

The jury heard the defendants' testimony and the above attempt by their counsel to withdraw it.

The defendants' appeal has devoted pages 38 to 40 to the contention that compensatory damages were excessive and that punitive damages should not have been awarded at all.

To support their contention, the defendants have cited a number of cases but an examination of the cases shows that each had their own peculiar set of facts which bore upon the award of damages and were different from the facts involved herein.

In Manfredonia v. Barry, 401 F. Supp. 762, (E.D.N.Y. 1975), the Court awarded $3,500.00 to each of 2 plaintiffs and $500.00 to each plaintiff for punitive damages. There was

no physical punching of the plaintiffs, no arm twisting and no shoving plaintiffs into a police car. At page 770 the Court commented that the police "defendant Burns eloquently acknowledged on cross examination" the nature of the police attitudes for their actions. The Court further stated that damages were to be determined by the trier of the facts or the jury.

In Vargas v. Korea, 416 F. Supp. 266 (S.D.N.Y. 1976) the dispute involved a prisoner and a guard. The plaintiff was a long term prisoner and was indicted for attempted homicide which probably played an important part for the relatively nominal award of damages.

In Magnett v. Pelletier, 368 F. Supp. 902, (D.C. Mass. 1973), the problem arose in New Bedford, Mass., where intensive rioting had occurred. Sniper fire and hurling of stones and bottles and the use of vile language against the police had resulted in serious confrontations in the area. The conditions were held by the Court to be turbulent and riotous (page 906). In that atmosphere the actions of the police were given considerable latitude but even then damages were awarded for unlawful entry of 3 to 4 minutes at most.

In Farber v. Rizzo, 363 F. Supp. 386 (D.C. Pa. 1973), demonstrations were conducted in Philadelphia by large numbers of people and the police sought to exclude certain persons who were using a bull horn from the area. The Court had issued a temporary restraining order and the case involved an application to punish the police for contempt. No damages were awarded but the Court stated that the defendants were in contempt of the order and were liable for damages (p. 398).

In Tatum v. Morton, 386 F. Supp. 1308 (Dist. of Col. 1974), the Court awarded nominal damages because there was a large public demonstration in Washington and the plaintiffs deliberately invited their arrest but could have been released by posting $10.00 as collateral. The plaintiffs refused to post the collateral and expressly sought to be arrested and the Court said that it considered the public demonstration of the plaintiffs and the fact that the plaintiffs chose not to post collateral as bearing upon the amount of damages to be awarded (p. 1313). Even under those circumstances, the Court gave $100.00 for each of the plaintiffs.

The cases cited by the defendants-appellants all have some special twist or turn which bore upon the damages and which elements were not present in the case at bar where an individual was committing no offense or crime and was deliberately set upon by the police defendants. The issue was presented fairly to the jury and they set the damages.

Thereafter on motion of defendants to reduce the damages the Trial Judge in his discretion reduced the compensatory damages from $12,000.00 to $4,000.00. The Trial Judge heard the witnesses and was in an excellent position to determine whether or not the damages were excessive. The jury was justified in awarding the damages.

The award of punitive damages was further justified because there can be no justification for the police officers to deprive the plaintiff of his liberty and to use force against him and to punch him around in the State Police car and then release him without any charge being made against him and without any report of the alleged arrest or arraignment of the plaintiff before any judge or court.

In REYNOLDS v. PEGLER, 223 F. 2d 409 (2nd Cir. 1955), a verdict of $1.00 for compensatory damages and $175,000.00 for punitive damages was awarded.

Cited with approval in GASTON v. GIBBONS, 328 F. Supp. 3, 5.

In CAPERCI v. HUNTOON, 397 F. 2d 799 (1st Cir. 1968), punitive damages were awarded for entry into plaintiff's home without a warrant even though the officers acted like gentlemen.

The jury decided the matter and the defendants merely seek to avoid the consequences of their conduct. The jury verdict on the issues of fact and the award of damages should be sustained.

CONCLUSION

THE JUDGMENT HEREIN SHOULD BE AFFIRMED.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Plaintiff-Appellee's Brief in the within matter upon Louis J. Lefkowitz, Esq., Attorney General of the State of New York (A. Seth Greenwald, Esq., Assistant Attorney General) addressed to him at Two World Trade Center, New York, N.Y. 10047 by first class mail, postage prepaid this 22nd day of February, 1977.

George H. Rosen.

George H. Rosen